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CASE NO. 79-1260

in the

Supreme Court
of the
United States

OCTOBER TERM, 1979

Noel Chandler and Robert Granger,

Appellants,

vs.

State of Florida,

Appellee.

On Appeal from the Supreme Court of Florida

REPLY BRIEF OF APPELLENTS

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November 3, 1980

QUESTION PRESENTED

Whether Experimental (now permanent) Canon 3A(7) of the Code of Judicial Conduct of the State of Florida is violative of a defendant's rights to a fair and impartial trial, and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States as written or when applied to permit electronic and still photographic media coverage of a trial in progress over a defendant's objection.

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REPLY BRIEF OF APPELLANTS

ARGUMENT

I.

THE SIXTH AMENDMENT GUARANTEES *THE ACCUSED* THE RIGHT TO A PUBLIC TRIAL.

Neither the Appellee nor any of the many *Amici* directly addressed this issue, relying instead on oblique references to, and incorrect interpretations of, the various opinions of the Court in *Richmond Newspapers, Inc. v. Virginia,* ____ U.S. ____, 100 S.Ct. 2814 (1980), for the proposition that the Sixth Amendment guarantee of the right to a public trial belongs to the media and the public in general. In fact, Mr. Chief Justice Burger made it clear that ". . . throughout its evolution, the trial has been open to all who *cared* to observe." *Id.*, at 2821 [emphasis added]; and, that *Richmond Newspapers, Inc., supra,* presented for the first time the question of whether closure of a trial is proper where there is no demonstration of the need to close the courtroom in order ". . . to protect the defendant's *superior* right to a fair trial." *Id.*, at 2821 [emphasis added]. Mr. Justice Stevens' concurring opinion in *Richmond Newspapers, Inc.* arrived at the same conclusion: ". . . the Framers quite properly identified the party who has the greatest interest in the right to a public trial." *Id.*, 100 S.Ct. at 2831, n. 2.

In short, the Court's decision in *Richmond Newspapers, Inc.* did not, in any way, depreciate the quality and integrity of the Sixth Amendment's guarantee of a public trial for the benefit of the accused.

II.

THE MEDIA'S RIGHT TO ACCESS TO THE COURTROOM IS NO GREATER THAN THE PUBLIC'S RIGHT, IN GENERAL.

All *Amici* and the State of Florida argue that:

1. *Richmond Newspapers, Inc., supra,* has created a right of access to the courtroom which is superior to that of the public in general;

2. Appellants seek to "close" the courtroom to the public (and media) in general; and

3. The media is the great "surrogate" for all persons and all purposes.

None of the above contentions is valid.

As previously indicated, *Richmond Newspapers, Inc., supra,* dealt with the arbitrary, seemingly inexplicable closure of the Courtroom, to the press and public alike, on the defendant's unopposed motion for same. *Richmond Newspapers, Inc., supra,* makes it clear that before a judge may bar the press and public from the Courtroom, there must be some demonstration of the need to protect the accused's " . . . superior right to a fair trial, or that some other overriding consideration requires closure." *Id.,* at 2821. *Sub judice* Appellants do not seek closure. The *Amici* briefs all argue that Appellants seek to bar the press in general. Nowhere in Appellants' Brief is that contention made, much less even suggested. It is almost as if *Amici* have not even read Appellants' Brief.

Messrs. Justices White and Stevens joined in the Chief Justice's opinion in *Richmond Newspapers, Inc., supra,* which concluded that the First Amendment prohibited the government from *summarily* closing the courtroom doors to the press. Appellants did not seek to bar either the public or the press. All Appellants objected to was the presence of the television cameras and the still photographer. Had the local newspapers attempted to set up a copy desk or printing press in the courtroom, Appellants would have, likewise, objected. Unlike *Richmond Newspapers, Inc., supra,* no effort was made to bar news reporters from the courtroom. News

reporters for television, radio and newspapers were all welcome to attend the trial. Appellee and "surrogates" have done a disservice to this Court by suggesting anything to the contrary.

Appellants agree, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the *public.*" *Richmond Newspapers, Inc., supra,* 100 S.Ct. at 2830 (Burger, C.J.) [emphasis added and footnote omitted]. This is not to say, however, that the First Amendment rights of the public and the press are absolute. As pointed out by Mr. Chief Justice Burger (*Id.*, at 2830, n. 18), Mr. Justice Brennan (concurring, with whom Mr. Justice Marshall joined) (*Id.*, at 2832, n. 2) and Mr. Justice Stewart (concurring) (*Id.*, at 2840), this right of access is not without limit; it is *not* absolute.

Not content with reading, interpreting and arguing *Richmond Newspapers, Inc.* beyond recognition, the media *Amici* have the audacity to suggest that they are the ever-powerful, omnipresent force which protects the public. It is as if the Constitution of the United States and this Court did not exist. The media's claim as "surrogate" for the public is bottomed on three sentences from Mr. Chief Justice Burger's opinion in *Richmond Newspapers, Inc., supra.*[1]

These self-appointed "surrogates", however, serve their own special interests. Who "appointed" the media to act for the public? The media! While a free press may be the backbone of our system of justice, the Defendant's right to a

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[1] "Instead of acquiring information about trials by firsthand observation or word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard." (Burger, C.J.) (100 S.Ct. at 2825).

fair trial is its *life's blood.* Presumably the press could accurately report on what occurred on a particular day and in a particular courtroom without a single television camera ever poking its tunnel-vision eye into the courtroom. But, how does a wrongfully convicted defendant recover the loss of his freedom?

The "surrogates" make mighty claims and extravagant statements about all the wonderful things television has done, and can do, for the public. It is not necessary to present a "laundry list" of television's commercial and educational accomplishments. It suffices to say, promoting a fair and impartial trial for the accused is not one of those accomplishments. " . . . [T]he news media's penchant for extensively covering sensational trials"[2] is well documented. Consider, for example, *Calley v. Callaway,* 519 F.2d 184 (5th Cir. 1975); *Sheppard v. Maxwell,* 384 U.S. 333 (1966), and *Estes v. Texas,* 381 U.S. 532 (1965).[3] With "surrogates" like that, who needs enemies?

Stung by *Gannett Co., Inc. v. De Pasquale,* U.S. , 99 S.Ct. 2898 (1979), and its progeny, every time the media is barred from a pretrial hearing by a conscientious judge attempting to protect a defendant's rights to a fair trial and due process of law, the media uses its power to villify and condemn those sworn to uphold the Constitution. In Florida, (as in every state which elects its judges), a barrage of " . . . editorial denunciation [is] visited upon every trial judge who bars the Media from his courtroom", *The Miami Herald Pub. Co. v. Hon. Royce R. Lewis,* 383 So.2d 236, 244 (Fla. 4th DCA 1980) (Letts, C.J., On Petition for Rehearing), regardless of the reason and irrespective of the need to protect a litigant's rights.

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[2] *United States v. Williams,* 568 F.2d 464, 467 (5th Cir. 1978).

[3] It is significant to note that each opinion in *Richmond Newspapers, Inc.*, which made reference to *Estes, supra.*, did so in an approving manner.

The "surrogates" perceive *Richmond Newspapers, Inc., supra,* as the talisman for all that is "wrong" with our system of justice. "Access is now unlimited," they claim. They contend that the commitment to government in the "sunshine" requires unlimited access, and authorizes the televising of criminal trials regardless of the impact on the accused's right to a fair and impartial trial. Not satisfied with access rights equal to that of the public in general, the "surrogates" continue to lobby judges to "open up" the Courtrooms to their equipment.

Recently, attorney Alan B. Morrison questioned the wisdom of *this* Court's continued ban on television cameras in the courtroom and suggested that because, " . . . the [Supreme] Court sits for fewer than 40 days a term . . . [and] there are only 200 seats for the general public . . .," access could and should be increased by "a simple solution . . . televising the proceedings." "Televising Supreme Court Actions", *New York Times,* Sept. 29, 1980, §A at 19.[4] Give the "surrogates" an inch, and they'll "take a mile."

III.

THE MERE PRESENCE OF TELEVISION AND STILL PHOTOGRAPHIC CAMERAS DURING A CRIMINAL TRIAL IS INHERENTLY PREJUDICIAL AND DETRACTS FROM ITS BASIC PURPOSE, THUS DENYING THE DEFENDANT HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

The Appellee and all *Amici,* except the Conference of Chief Justices, (hereinafter referred to as "CCJ"), baldly

[4]It is interesting to observe that despite the claims of Appellee and *Amici* that televising trials and judicial proceedings generally are not "disruptive", and further, that modern television cameras are unobtrusive, neither Appellee nor the many media *Amici* have filed a motion with this court to televise the oral arguments in this case (*See,* page 9, *infra*).

assert that Appellants received a fair trial or that televised criminal trials do not operate to deny the accused his right to a fair trial.[5] No evidence, no testimony, and no sociological or psychological studies are offered in support of their position.[6] No effort is made to refute or rebut the Appellants' socio-psychological studies. The only response offered by Appellee is that Appellants failed to demonstrate the requisite level of pervasive pretrial publicity so as to be entitled to relief in this Court.

Appellee and *Amici* have missed the point. This is *not* a publicity case. This case involves the narrow but Constitutionally significant question of the effect of electronic and still media's presence on the Defendant's Sixth Amendment right when the Defendant objects to in-court coverage of his case, regardless of pretrial publicity.

A. *Estes v. Texas*, 381 U.S. 532 (1965) Revisited.

All opposing briefs which addressed this issue concluded that *Estes, supra,* was not a mandate to bar television cameras from the courtroom. Yet, all *Amici* and the Appellee overlooked the fact that this Court, in several opinions in *Richmond Newspapers, Inc.*, cited *Estes* rather than receding from it. Appellee claims, in its Brief at 39, that Appellants ". . . made absolutely no effort, *as is their duty,* to seek less stringent remedial measures than exclusion of the camera and sequestration of the jury." Appellants have *no* such duty under either Federal or State Constitutional or Statutory

[5] *See, e.g.*: Appellee's Br. at 26-56; States' Attorneys' General's Br. at 38, (hereafter "SAG"); Columbia Broadcasting System, Inc.'s Br. at 11-21, (hereafter, "CBS"); Florida News Interests' Br. at 18-28, (hereafter "FNI"); Community Television Foundation of South Florida, Inc.'s Br. at 26-27, (hereafter "PBS"); Radio Television News Directors Association's Br. at 16-20, (hereafter "RTNDA").

[6] The words "evidence", "testimony", and "studies" are used in all opposing briefs, but as will be shown *infra*, Appellee and *Amici* are "blowing in the wind".

law. The presiding trial judge has that responsibility. The Court, not the defendant, controls the conduct of the trial. Appellee alleges in its Brief at 54 that ". . . defendants have erroneously sought an absolute right to exclude the public through its 'surrogate' the electronic media *without* any Record showing that alternatives were inadequate." Appellants are perplexed. It is clear that Appellee did not read the brief that Appellants submitted to this Court. *Nowhere,* in the trial proceedings below, did the Appellants seek to exclude the public.

Estes, supra, is, and remains, Appellants contend, a mandate for the proposition that when a defendant *objects* to the presence of electronic media, the equipment ought to be excluded. Appellee's Brief at 28, n. 13, is grossly inaccurate. Objections *were* raised (and overruled) to the presence of television cameras in *Diggs,*[7] and the other cases cited there. Even the Attorneys General of the sixteen States which joined in the *Amicus* Brief filed by Wisconsin Attorney General Bronson C. LaFollette, conceded that *"a trial televised with the defendant's consent raises different fair trial questions than one televised without the defendant's consent."* (SAG Br. at 8, n. 1).

Several *Amici* argue that present technology has improved, and that the state of television is such that the day envisioned by Mr. Justice Harlan in *Estes v. Texas, supra,* 381 U.S. at 595-596, and by Mr. Justice Stewart, 381 U.S. at 604, has arrived. While Appellants have conceded that *physical* disruption is not the issue *sub judice,* the fact of the matter is, human nature has not changed since 1965.

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[7]*Diggs* is the so-called "McDuffie" case which is referred to in Appellant's Br. at 51, n.28; Appellee's Br. at 102-104, and FNI's Br. at 21-22. Media is no doubt proud of its role in the aftermath of the televising of selected portions of the Diggs trial, and the seemingly inexplicable verdict. (*See,* pages 18-19, *infra*).

The "technological improvements" argument as a basis for televising criminal trials is interesting for an additional reason. Despite the extravagant claims of Appellee (Br. at 85-86), RTNDA (Br. at 7), CBS (Br. at 24) and SAG (Br. at 14-18), that the new television cameras ". . . weigh only 18 to 20 pounds, and are about one-seventh the size of the old studio camera" [used in *Estes*] (CBS Br. at 24), no *Amicus* had the temerity to file a motion in this Court to demonstrate (during oral argument) these cameras and the "state of the art." Certainly this Courtroom could unobtrusively accommodate a camera which occupies but two square feet of floor space. *Id.*, at 24.

B. Television is Different and Causes Witnesses and Jurors to Act, and React, Differently

In response to Appellant's socio-psychological studies, Appellee refers to articles which appeared in the American Bar Association Journal. (Appellee's Br. at 98-99). Appellee also relies on a short synopsis of a paper prepared by Kermit Netteberg[8] in partial fulfillment of a doctoral degree at the University of Minnesota. The "research" was funded in part by the National Association of Broadcasters,[9] which is one of the *Amicus* on the RTNDA brief filed herein.

An analysis of the study itself, rather than the author's synopsis, indicates its lack of reliability as "evidence" for this Court. The author states unequivocally that "*research* has not shown a significant adverse impact of television on courtroom participants." *Id.*, at 469 [emphasis added, footnote omitted]. The basis for that statement is a series of articles written by media people and lawyers. The article itself is replete with *non sequiturs* and serious deficiencies in terms of "research" and "fact-finding" as those concepts are

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[8]Mr. Netteberg is currently an Assistant Professor of Journalism at Andrews University, Berrien Springs, Michigan.

[9]*See*, Netteberg, *Does Research Support the Estes Ban on Cameras in the Courtroom?*, 63 Judicature 467 (May 1980).

generally understood in the legal (and academic) world. Sweeping generalities and incredible conclusions are reported as "fact" and adopted by the Appellee as "proof". Appellee overlooked the author's observations that the Florida study[10] (OSCA) ". . . suffered from several methodological flaws, including extreme simplicity in instrumentation and the rush which the Florida Court's deadline imposed upon the researchers." *Id.*, at 472. Interestingly, to Mr. Netteberg, the fact that 80% of the Wisconsin judges and 77% of the Florida judges ". . . thought there was no incompatibility between television and fair trials," *Id.*, did not rise to the level of a constitutionally significant number of negative responses (*i.e.*, 20% and 23%, respectively).[11]

Perhaps, however, the most incredible aspect of Appellee's reliance on the Netteberg article is Attorney General Jim Smith's failure to comprehend that the author concluded, "[w]hile these surveys are more generalizable than case studies, they still *cannot be used as evidence to draw casual* [sic] *conclusions.*" *Id.* [emphasis added].

The *Amici* dismiss the issue of witness and juror impact with the argument that because the majority favors, or does not object to, televising, it is Constitutionally acceptable. That contention begs the question. The Florida News Interests Brief, authored by Talbot D'Alemberte (who is the architect of the televised criminal trial rule and lead counsel for Post-Newsweek Stations of Florida, Inc.) challenges Appellants to answer the question, "What difference in impact [on witnesses and jurors], for instance [is there] between sketch artists and cameras?" (FNI Br. at 27)(footnote omitted). There is a significant difference. At

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[10]The Florida study is analyzed in great detail in Appellants' initial Brief at Point IV-C.

[11]Mr. Netteberg even apologized for the fact that only 1/3 of the Wisconsin trial judges responded to the questionnaires.

least, the Fifth Circuit Court of Appeals has so held in *United States v. Columbia Broadcasting Systems, Inc.*, 497 F.2d 102, 105 (5th Cir. 1974). There, the Court stated, "[w]e are not persuaded, however, that the impact of being sketched for later publication can be equated with the *uniquely prejudicial impact of telecasting.*" [emphasis added]. Lead counsel in *Columbia Broadcasting Systems, Inc., supra,* was Talbot D'Alemberte.

The issue is not whose interpretation of the statistics should prevail. The States' Attorneys General's Brief at 18-38 discusses the results of the Wisconsin experience with distraction and/or disruption of jurors, witnesses and judges. Having examined, very carefully, the underlying Wisconsin Report,[12] certain observations are in order:

1. The Wisconsin Report suffers from the same congenital defects and inadequacies that have been attributed to the Florida OSCA survey.

2. Apparently no attorneys specializing in criminal law were on the Wisconsin Committee,[13] but there were press and media representatives.

3. Attorney General LaFollette's repeated assertion that "the experiment was successful" is purely subjective.

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[12]A copy has been lodged with the Clerk of this Court by *Amicus*. The full title of the document is "Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom", (April 1, 1979).

[13]This is perhaps an appropriate place to respond to the FNI Br. at 5, n.4. The undersigned did *not* participate, *per se,* in the Florida Rule making procedure. The Florida Rule developed despite resistance from all organized bar groups. The undersigned, as counsel for Appellants, *opposed* the rule, and was never offered an opportunity to "suggest" different rules. The only suggestion that the undersigned counsel would have made was "exclude cameras when the defendant objects". That position was made clear in appellate litigation in Florida.

Similarly, the casual use of the word "evidence" in his brief ought to be offensive to the trial bar.

4. The statement that "[t]elevised trials should not be banned at this early juncture when relatively few people have actually participated in one",[14] offered as a justification for continued violation of basic Constitutional rights, is *reductio ad absurdum.*

5. According to General LaFollette, community pressures on jurors are the same whether the trial is televised or not.[15] Again, that is not accurate. Television news gives very limited, highlighted (therefore often unbalanced) news reporting. This format makes television news little more than a "headline" service. How is the viewing audience expected to understand a jury's apparent inconsistent verdict when only the sensational parts of the trial are shown? *See also,* pages 18-19, *infra.*

6. The States' Attorneys General's Brief concludes that based on the Wisconsin study, trial participants were "not significantly distracted".[16] This is not accurate.[17] An examination of the Wisconsin Report establishes the contrary.[18] One Wisconsin Judge was quick to point out that televising trials made him ". . . more selective in [the] choice of neckties each morning . . ." (Wisconsin Report at 24). Perhaps the litigants would have fared better if the Judge had spent that extra time reviewing the trial briefs!

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[14]SAG brief at 14.

[15]*Id.*, at 22.

[16]*Id.*, at 23-35.

[17]*See,* Regan and Cheng, *Distraction and Attitude Change: A Resolution,* 9 Journal of Experimental Social Psychology 138 (1973).

[18]Pertinent excerpts from the Wisconsin Report are found in the Appendix to the Reply Brief (ARB) at 3-10.

While lawyers may debate the issue of witness distraction *ad infinitum*, at least one Court-appointed psychiatrist, called upon to testify in a Wisconsin criminal case, had some rather telling observations which support Appellants' contention. Dr. John Mulvaney's responses to pertinent questions were as follows:

> To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?
>
> Oh, I suppose to some degree. I felt it was not just me. It had an effect on the entire proceeding. I had a negative feeling. The proceeding is more important than the publicity. Newspaper and TV people had a detrimental effect; and not just in the courtoom [sic]. I was not in favor of it. I didn't think people should be on exhibit. It's enough of a circus without making it public.
>
> * * * * *
>
> If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?
>
> Without. I feel my [appearance] was an obligation to the psychiatric community and I was not interested in demonstrating for publicity. TV makes it a public exhibition.
>
> What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?
>
> You would have to ask the jury. I don't know what affect [sic] it had on the questions that were asked me; ask the prosecutor and the defense attorney.
>
> Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio

equipment, and (c) still cameras?

> It doesn't have to be there. The court doesn't have to justify to the public that it is doing right; it doesn't have to apologize to the public. I don't think putting witnesses with instability will make them more stable. It may be a disservice. When a witness has a problem with stability, it won't make him more comfortable.

Wisconsin Report, Appendix I, p.19.

Finally, the States' Attorneys General's Brief, in attempting to establish that televising criminal trials *promotes* witness recollection and thus improves witness testimony, relies on what it labels ". . . a scientific study simulating courtroom conditions . . ." (SAG Br. at 29). The phrase, "simulating courtroom conditions", conjures up the presence of a Judge, (wearing a black robe), with opposing counsel, bailiffs and other courtroom personnel in attendance, and that the witnesses were made aware that their "testimony" was under oath, subject to the penalties of perjury. This study was not even close in its effort to "simulate" a courtroom setting, nor was it "scientific".

The study[19] was conducted by a journalism professor at the University of Wisconsin who employed thirty-six volunteer students (hardly your "average" witnesses). The students were seated in the center of a large room[20] and shown a two minute film describing a German post office in West Berlin. After viewing the film, each student was asked questions about what he or she had seen. The students were divided into three groups. One-third knew they were being televised and could see the camera; one-third knew they were

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[19]Hoyt, *Courtroom Coverage: The Effects of Being Televised*, 21 Journal of Broadcasting, 487 (1977).

[20]As opposed to being seated in the "witness 'stand' ".

being televised but could not see the cameras. The third group was not subjected to any camera whatsoever.

Before being asked to view the film in question, the students were told the study was an attempt to assess the effectiveness of different types of media presentations. The first two groups were also told, *in advance,* of the presence of the camera. Thus, groups one and two *knew* they were being televised while they were observing an event. Hence, the conclusion that witnesses who know they are being televised while they are observing something recollect facts better, is not surprising. Obviously groups one and two made a conscious effort to remember what they were being shown so they could recollect it better. In real life, most witnesses "happen" on the scene, and then weeks, months, or even years later are called upon to recollect events, facts, faces, etc. Unless a potential witness knows today that he is a witness to something, and knows that his present conduct is being recorded, and further, he is told he is going to be "tested" on it in the future, the study is meaningless. In short, the study hardly simulated courtroom conditions, much less real life! Reliance by Appellee and *Amici* on the Hoyt study is preposterous.

C. Continued Television Coverage of Trials is Likely to Erode the " . . . fundamental conception of what a trial should be." *Estes, supra,* 381 U.S. at 580 (Mr. Chief Justice Warren Concurring)

The purpose of a criminal trial is to see that justice is done. Justice for the victim, society, the system *and* the accused. Television interferes with that purpose. "[T]he courts are playing with social dynamite. Television changes everything it touches, and there is no guarantee that the courts are any more immune than the National Football League." Reeves, "Courtrooms: How Public", *The Post* [West Palm Beach, Florida], May 28, 1980, §A, at 19.

The erosion, or survival, of the jury system in criminal cases, at least, may well depend on the treatment it receives at the hands of the press. Appellants are not unlike David, standing on the Coastal Plain of the Promised Land.[21] No less than thirty-one special interest media groups have joined forces, all proclaiming a right superior to that of the system's life's blood. Without citing any real "evidence",[22] these special interest groups may well prevail, may well dictate which constitutional guarantee is superior, unless this Court "draws the line" as a matter of public policy, so that we return to the fundamental purpose of a trial, i.e., the search for the truth so that justice may be done.

Witnesses called to Court are often reluctant to testify. Witnesses are not anxious to have their pictures taken and/or their faces broadcast. *Amici* contend that televising trials will promote higher standards of justice; witnesses are likely to come forward — offer to testify — right in the middle of a trial (PBS Br. at 21). "[P]erjury and other misconduct will be deterred." *Id.* The author of that sentence, as brilliant and highly respected a lawyer as he may be, simply does not understand the *criminal* trial system.[23]

Most people are not happy about being in Court, much

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[21] I *Samuel* 17:4.

[22] In 1768, Mr. Justice Blackstone defined evidence as ". . . that which makes clear or ascertains the truth of the very fact or point in issue. . . ." Commentaries, III, 367. No 'study' or item cited as 'evidence' by Appellee or *Amici* would ever be admitted into any Federal, or Florida, Court of law under the prevailing decisional or statutory rules of evidence.

[23] Can *Amici* really be serious? Imagine this scenario: In the third day of trial, counsel for Defendant reports to the Court, "Your Honor, I have a new witness." Or, "Your Honor, I move for a mistrial." The lawyer continues, "It seems, Your Honor, last night while watching television, a citizen realized he was a witness to this alleged crime, and he has exculpatory evidence for my client." The variations on the scenario are as limitless as man's imagination. The likelihood of a person coming forward as a witness because he or she has seen a criminal trial in progress is minimal indeed.

less relaxed and self-assured. Fifteen years ago, Judge M. Ray Doubles wrote:

> Timid and nervous as they may be about talking in public, the human nature of the average person is that he be not photographed for public display. Such an ordeal, without question, would not only hamper such a witness in his recollection and ability to accurately give his testimony, but his demeanor on the witness stand would reflect adversely upon the weight of his testimony in the minds of the jury to the disadvantage of the party for whom his testimony is given.
>
> It is no answer to such a person that the camera itself is hidden in a booth outside the walls of the courtroom. The fact that he knows he is being televised would be sufficient to unnerve him. Nor is it an answer, as provided in the Colorado Canon, that no such witness shall be photographed over his express objection. This requires him to take the affirimative [sic] and register a protest in advance in order to protect himself from such an ordeal. He may very well feel that to register such a protest labels him as a weakling of some sort, and pride may prevent him from doing so.
>
> At the other extreme is the danger inherent in the testimony of the witness who is not only willing but anxious to be televised as he gives his testimony. He is a willing actor, and his concern will be with his effectiveness as an actor rather than compliance with his oath to tell the truth and nothing but the truth.
>
> Furthermore, there is the juror to consider. He is summoned and required to serve, unless excused, irrespective of his desires or the inconvenience it may cause him. But here again, he is summoned to listen,

> ponder and render judgment — not to participate in a glamour contest. In his work as a juror he should be afforded an environment in which he can concentrate on his task as a juror, and not be concerned as to whether his frown is doing an injustice to his naturally photogenic features, or whether his crooked tie and ruffled hair are the butt of jokes, around the TV screen at Joe's Beer Tavern or the Country Club.

Doubles, *A Camera in the Courtroom,* 22 Wash. and Lee L.Rev. 1, 14 (1965).

What high standard of justice is promoted by offering a different form of "entertainment" to the average American household? *Amici* and Appellee argue that televising the Midnight Mass,[24] naturalization proceedings,[25] concerts and operas, *inter alia,*[26] or even the Pope's Coronation, does not detract from the solemnity of those occasions, and therefore, it is perfectly acceptable to televise criminal trials. The logic of that assertion escapes Appellants.

Regardless of media's disclaimer of responsibility[27] in connection with the tragic aftermath of the "McDuffie" verdict, others have linked the rioting in Miami to the highly selective and sensationalized television reporting of in-courtroom scenes.[28] Attorney and Harvard Law Professor, Eric Salzman, producer of the television show, "CBS Reports: The McDuffie Trial", undertook a serious effort to understand the McDuffie case, the verdict and its impact on the community. Salzman observed that at first he thought

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[24]PNI Br. at 11, n.19.

[25]Appellee Br. at 61.

[26]PBS Br. at 12-14.

[27]*See,* FNI Br. at 21-22; Appellee's Br. at 102-104.

[28]*See, for example,* the *sworn* testimony of City of Miami (Florida) Police Chief, Kenneth I. Harms, before the Governor's Special Commission (investigating the causes of the May 1980 riots) on July 8, 1980, found in ARB at 10-11; *see also,* Appellants' Brief at 51, n.28.

the not guilty verdict in McDuffie was a "red-neck" decision. "Salzman Changes Mind About 'Red-Neck' Decision", *Miami News,* August 27, 1980, §B, at 5. Because of the riots, Salzman studied the trial and the verdict. Salzman ". . . had to forage through the video tapes of no fewer than eight television stations before [he] could compile footage of the trials. He found no one had a complete record . . . . It was cut off at the whim of the cameramen or the directors." *Id.* Then Salzman read the entire 2,500 page transcript of the trial. *Id.* Eventually, having read the entire trial transcript and completing his investigation, he understood what we, as criminal trial attorneys, understand. The verdict was "correct" based on the "system" and the evidence.[29]

The community did not have the benefit of gavel-to-gavel coverage. The media elected to broadcast in 30-60-90 second clips, the State's witnesses demonstrating how the defendants beat the victim, the medical examiner describing the fatal wounds, and gross pictures of McDuffie's injuries. Joann Hooker, "CBS Reports: The McDuffie Trial", *Miami News,* August 27, 1980, §B, at 5. The "surrogates" did not televise the hour-after-hour of relentless and damaging cross-examination of the State's witnesses by the defendants' attorneys, nor did media broadcast any of the fatal gaps in the State's case. Little wonder, then, at the community's inability to understand the acquittal.

The "surrogates'" claim, that "public television's broadcast coverage of judicial proceedings is programming of great social value",[30] is, under these circumstances, sheer hypocrisy. Appellants do not contend that public television is

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[29]Salzman also observed that, in his opinion, the verdict was a result of a ". . . series of miscalculations by the Dade County State Attorney's Office." *Miami News,* August 27, 1980, §B, at 5. Florida State University College of Law Professsor, Ken Vinson, came to a similar conclusion. *See,* "McDuffy Verdict Was 'Justice' ", *Tallahassee Democrat,* June 9, 1980, §A at 4.

[30]PBS Br. at 7-23; see also, RTNDA Br. at 10-11.

"utterly without redeeming social value", rather, in the context of a defendant's right to a fair and impartial trial, it obviously "lacks serious literary, artistic, political or scientific value".[31]

D. There Is No Constitutional Basis to Justify Televising a Criminal Trial[32]

The accused's Sixth Amendment Right to a fair and impartial trial has a preferred position in criminal proceedings. *Estes v. Texas, supra; Sheppard v. Maxwell,* 384 U.S. 333 (1966); *United States v. Tijerina,* 412 F.2d 661 (10th Cir. 1969). Nothing in the several opinions in *Richmond Newspapers, Inc., supra,* suggests anything to the contrary.

Even if televising criminal trials "promotes First Amendment *interests*", as argued by all four of the special interest media "surrogates",[33] that is still insufficient justification to deny the accused his individual Constitutional *rights*. If ". . . a purported [international] treaty obligation of the United States Government cannot override an individual Constitutional right", *In re Geisser v. United States,* No. 79-3869, Slip op. at 248 (5th Cir., Oct. 10, 1980)[citing *Geisser v. United States,* 513 F.2d 862, 869, n. 11 (5th Cir. 1975)(citing *Reid v. Covert,* 354 U.S. 1 (1957)], how can this Court, consistent with its obligation to the Constitution, derogate Appellants' Sixth Amendment *right* to that of a First Amendment *claim?* All the media *Amici* missed the point. Because television is different, *United States v. Columbia Broadcasting System, Inc., supra,* and because human nature is what it is, even if televising a trial fosters First Amendment interests, where a defendant objects

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[31] *Cf., Miller v. California,* 413 U.S. 15 (1973).

[32] Appellee and four *Amici* (CBS, CCJ, PBS and RTNDA) have raised the issue of State's Rights. Appellants' response to that issue is found at Point V, *infra.*

[33] CBS Br. at 4-11; FNI Br. at 3-6; PBS Br. at 27-29; RTNDA Br. at 9-16.

to the presence of electronic or still photographic equipment in the courtroom, the Constitution requires that the accused be given the benefit of the doubt. Under our system of justice, as imperfect as it may be, " 'tis far better to err in favor of a guilty person than it is to err against an innocent one." Televising political, administrative and even legislative proceedings is different than televising a criminal trial. The public will not be "better" informed by 30-second newsclips of a rape victim pointing at the defendant; instead, the victim will suffer greater humiliation. Furthermore, if, for any reason (including insufficiency of evidence) the defendant were to be acquitted, his unwanted television notoriety will follow him to his grave.

Who will be the humiliated and embarrassed victim's "surrogate"? Who will pick up the gauntlet for the acquitted defendant? What if, while promoting its own Nielsen ratings by sensationalizing the news, the media (even inadvertently) breaches the jury's integrity, thereby destroying its ability to function fairly and impartially, with the result that an innocent person gets convicted? Who will be *his* champion?[34]

Amicus PBS contends that Appellants are not entitled to relief because of the alleged lack of "facts to substantiate their claim that the mere presence of a television camera in the courtroom adversely affects witnesses and jurors". (PBS Br. at 26). Counsel for PBS has overlooked the sociological and psychological studies relied upon in Appellants' initial brief. The Constitutional question turns on subconscious considerations. Asking a witness or a juror the question, "Will being on television [subconsciously] bother you?" is an

[34] "In trial by battle, clerks, infants, children, and those over sixty years of age were from the first allowed to employ 'champions,' who fought in their stead; and subsequently the right to employ champions was extended to all litigants. Down to the Statute of Westminster I, 1275, c. 41, the champion was obliged to swear to his belief in the truth of the case set up by his principal, and, if it could be proved that he had sworn falsely, he was liable to lose a hand or a foot." Jowitt & Walsh, *Dictionary of English Law*, 342 (1959).

exercise in futility. If we knew how to consciously measure the subliminal, we would have little need for psychologists, psychiatrists, psychotherapists and sociologists.

Amicus RTNDA offers the most novel argument for continuation of the rule: " . . . [p]hotographers and electronic journalists [are now] on a par with print reporters in their ability to communicate through their respective media." (Br. at 15). There, then, is the real basis for the "surrogate's" efforts to override the accused's Constitutional right, economic competition. Next, the copy editors and the typesetters will clamor to have their equipment in the Courtroom. Perhaps the solution is to simply move the trial — lock, stock and barrel — to the television station or to the newspaper's plant.

Regardless of the "window dressing" arguments advanced by *Amici* States' Attorneys General and States' Chief Justices, no organized bar group or professional legal society has taken a position in support of continuing the "experiment". To the contrary, in addition to the *Amici* briefs filed by the American College of Trial Lawyers and the California State Public Defender's Association, *et. al.*, the National Association of Criminal Defense Lawyers has taken a firm and unremitting stand against the use of cameras and recording equipment in all criminal trials.[35]

Equally important is the position taken by Milwaukee County (Wisconsin) District Attorney, E. Michael McCann, ". . . [who is] profoundly committed to the position that cameras should be excluded from the court when vetoed by the defendant."[36] Mr. McCann's commitment to the Constitutional rights of the accused is consistent with the highest legal and ethical responsibility imposed by our system

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[35]*See,* ARB at 11-12.

[36]Mr. McCann's position is clearly stated in a remarkably candid letter addressed to Appellants' counsel which is reprinted, in its entirety, in ARB at 13-14.

on a prosecuting attorney. Mr. McCann's office has previously sought, in an application to this Court, to prevent the televising of a criminal trial in an effort to protect the rights of the accused, and witnesses, in order to assure that "justice" would be served.[37] It is remarkable that the Attorney General of the State of Wisconsin would press for televising criminal trials, even over a defendant's objection, while those who enforce the law on a daily basis, in his own State, oppose the presence of television equipment in the courtroom.

IV.

PERMITTING ELECTRONIC MEDIA AND STILL PHOTOGRAPHIC COVERAGE DURING A CRIMINAL TRIAL OVER THE DEFENDANT'S OBJECTION, ON BALANCE, DENIES THE ACCUSED DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT.

The States' Attorneys General's Brief concedes the "nub" of the question. Where a defendant objects to the presence of television equipment, "different" Constitutional questions are raised than where there is no objection. (SAG Br. at 7, n. 1). As Appellee correctly points out in its Brief at 111, n. 44, in twenty years Colorado '. . . has never had a trial declared constitutionally unfair because of the mere presence of a television camera . . . .' That is because Colorado *requires the consent of the defendant!*[38]

This country was founded on the concept that

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[37] *See, State of Wisconsin v. Mendoza,* United States Supreme Court Misc. No. A-840 (Application for stay of trial proceedings pending filing of Petition for writ of Certiorari, Denied by Mr. Justice Stevens on April 5, 1978).

[38] *See,* Colorado Code of Judicial Conduct, Canon 3(A)(7)-(10), Colo.Rev.Stat., Vol. 7A (Court Rules), Appendix to Chapter 24; and RTNDA Br. at A-5.

government derived its ". . . just Powers from the Consent of the Governed . . ." Declaration of Independence, July 4, 1776. Appellee and *Amici* would have this Court brush aside, in fact ignore, that basic precept. Appellants contend that having refused consent, thereby declining to freely and voluntarily waive their Constitutional rights, they have been denied due process of law.

The fact that Appellants cannot measure or quantify the prejudice *sub judice* is immaterial. ". . . [T]he concept of due process of law is not final and fixed . . ." *Rochin v. California*, 342 U.S. 165, 170 (1952).

As reluctant as this Court may be to reverse the convictions of Appellants,[39] the Due Process Clause compels that result where there has been a violation of the guarantee of fairness in a criminal trial.[40] *See, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927); *Betts v. Brady*, 316 U.S. 455 (1942); *cf., Gideon v. Wainwright*, 372 U.S. 335 (1963); *Estes v. Texas, supra.; Sheppard v. Maxwell, supra.; Griffin v. People of the State of Illinois*, 351 U.S. 12 (1956).

Appellants' contention, in a nutshell, is that where a defendant objects to the presence of electronic and still photographic equipment, they must be excluded from his trial or there is a *per se* violation of his right to due process of law.[41]

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[39]Mr. Justice Stewart stated it thusly, ". . . it is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice." *Bumper v. North Carolina*, 391 U.S. 543, 550-551, n.16 (1968).

[40]Appellee's and CBS' reliance on *Spencer v. Texas*, 385 U.S. 554 (1967), is misplaced. *Spencer* dealt with the constitutionality of a Texas Rule of Criminal *Procedure*, as opposed to the *substantive* rule *sub judice*.

[41]Conversely, where a defendant fails to object, and where such waiver is free and voluntary, he ought not be heard to complain.

A. A Denial of Due Process of Law in Cases Involving the Publicity of Criminal Matters May Be Found Even Without an Affirmative Showing of Actual Prejudice.

Appellee and two *Amici*, CBS and RTNDA, contend that Appellants are not entitled to reversal of their convictions because they are not able to point to *specific* prejudice. CBS argues Appellants' case was "routine". (CBS Br. at 17-21). It is not unusual that the "black and white" record fails to communicate the true flavor of a case. Gone are the personalities, tensions and pressures. Missing is the "roar of the greasepaint, the smell of the crowd." No matter whose version of the facts this Court adopts,[42] the case, the crimes, and the manner in which Appellants were detected are hardly "routine".[43] The presence of the television cameras, even for just a portion of the trial, established the "newsworthiness" of the case.[44]

An interesting comparison may be found in the *Estes* case. There, the *pretrial* motions were televised extensively, because media was concerned, at least in part, by Estes'

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[42]Appellants stand on their version of the facts. Of all the many counsel in this case at this point, only one, the undersigned, was present in the trial court. Appellants contend their version of the facts is accurate, notwithstanding the assertions of CBS in its Brief at 20-21, n.43 and 48. The trial court made it quite clear to trial counsel that the latter "had better 'clean up' the record". App. at 9. And, the trial judge initially said he would give a specially requested instruction regarding witnesses not watching television (App. p. 7), but later that day, when again requested, declined to do so (App. p. 14). Finally, prospective juror Warren did agree, at first, that if a camera was in the courtroom, there was "something special" about the case (App. 9).

[43]*See* Appellee's Br. at 84, n.28, detailing the local newspapers' coverage of Appellants' trials and tribulations.

[44]CBS' suggestion in its Brief at 18, n.35, that the case was not newsworthy because television stations did not cover the motion to suppress is absurd. In fact, the reason there was no television equipment in the courtroom at the time of the motion to suppress was because by the time the television stations found out about the hearing, it was over!

efforts to preclude live coverage. *See, Estes v. Texas, supra.*, 381 U.S. at 535-536. The only live telecasting of *Estes'* trial itself was the closing arguments of the prosecutor and the return of the jury's verdict. *Id.*, at 591, n. 1, and 608. Thus, in *Estes,* there actually was even less "demonstrable" prejudice. Appellants contend that the very nature of the problem makes "testing" and "measuring" impossible. Thus, a *per se* rule[45] is the only workable solution.

In a rather extraordinary statement, CBS asserts that because of the public's familiarity with, and acceptance of, television today, ". . . there is no sound basis for presuming that any significant adverse psychological effects on jurors, witnesses or other participants occur." (CBS Br. at 15). That statement is totally unsupported by CBS. Not a single item of evidence, not a single psychological study is offered in support of that conclusion, nor could there be, for that statement is totally contrary to human nature. It is as if argument of counsel has been elevated to evidence!

Finally, contrary to Appellee's and *Amici's* assertions, this Court has indeed fashioned *per se* rules when necessary

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[45]Appellants urge this Court to adopt a rule which would allow the *accused* (not the "surrogate") to be the primary judge of whether his trial should be televised. Where a defendant does not object, but a witness, juror or other participant does, then the trial judge should have the discretion to make such decisions as are consistent with the objector's individual rights, and the public's right to know, as well as the press' (reasonable) right of access in news gathering activities. Interestingly, Hillsborough County, Florida Circuit Court Judge Morton J. Hanlon proposed to the Florida Constitutional Revision Commission, on August 5, 1977, that the question of televising trials be put on the State's Referendum Agenda for inclusion in the Florida Constitution. This Commission declined to put the matter on the State ballot. In fact, the proposal never got out of committee. *Amicus* FNI's attorney, Talbot D'Alemberte, was chairman of the Florida Constitutional Revision Commission at the time.

to protect an individual's fundamental Constitutional rights.[46]

Amicus CBS contends that the Due Process Clause only protects an individual where there is a defect in, or impediment to, "fundamental fairness in fact-finding." (*See*, CBS Br. at 10, n. 20, and cases cited therein). Appellants agree. That is their very argument. The presence of television and still photographic equipment in a courtroom over their objection gives rise to a departure from fundamental fairness in the fact-finding process.

B. The Failure of the Florida Supreme Court to Conduct Scientifically Reliable and Constitutionally Valid Studies to Determine the Effects of Televising Criminal Trials Fatally Taints the Appellants' Convictions.

Appellee and several *Amici* claim that the Florida

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[46]*See, e.g., Gilbert v. California*, 388 U.S. 263, 273 (1967) (violation of Sixth Amendment right to counsel at post-indictment lineup at which defendant is present results in the automatic exclusion of that identification); *see also, United States v. Wade*, 388 U.S. 218 (1967); and *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (no incarceration permitted unless defendant has been afforded right to counsel at his prosecution); *see also, Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Miranda v. Arizona*, 384 U.S. 436, 444-445, 467-476 (1966) (confessions obtained during custodial interrogation are inadmissible in State and Federal criminal trials if certain procedural safeguards have not been observed, or if the suspect has failed to make a knowing, intelligent, and voluntary waiver of his Fifth Amendment rights before confessing); and *Casteneda v. Partida*, 430 U.S. 482, 492-493 (1977) (denial of equal protection to try defendant under indictment returned by Grand Jury from which all persons of defendant's race or color have been intentionally excluded by the State solely on the basis of race or color); *see also, Swain v. Alabama*, 380 U.S. 202 (1965); and *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (jury selection system that operates to exclude women from jury duty does not provide fair cross section of community, and hence violates Sixth Amendment); *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (white may object on Sixth Amendment grounds to the exclusion of blacks in jury selection system although no prejudice shown); *see also, Duren v. Missouri*, 439 U.S. 357, 359, n.1 (1979).

experiment was "carefully designed and cautiously conducted,"[47] that Florida "carefully evaluated the possibilities of prejudice to defendant's rights, both when it authorized the experiment . . . and when it established a permanent rule,"[48] and finally, that "Florida adopted the rule allowing access only after lengthy and deliberate proceedings."[49]

Those broad statements are totally unsupported by the facts. First, according to the Docket Sheet in the Florida Supreme Court in connection with the Rule change,[50] only eight trial judges filed reports regarding televised trials during the one year experimental period.[51] Second, no records were kept of the number of criminal trials televised, the number of criminal trials not televised, the number of defendants who objected, the number who did not; nor were any records kept of the number of defendants whose televised trials resulted in acquittals, convictions or mistrials, as opposed to those defendants whose trials were not televised. Third, absolutely no sworn testimony or adversary hearings were ever conducted by Florida Supreme Court.[52] *Cf., In re Hearings concerning Canon 35 of the Canons of Judicial Ethics,* 296 P.2d 465 (Colo. 1956). Finally, suggestions *before,* during and after the experimental period made to the Florida Supreme Court that experts in the fields of psychology and sociology be utilized, were totally ignored.[53]

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[47]SAG Br. at 6-14.

[48]RTNDA Br. at 19-20.

[49]FNI Br. at 6-15.

[50]*In re: Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979) [Florida Supreme Court Case No. 46,835].

[51]There are 286 Circuit Court trial judges in Florida. Only 8 responded to the Florida Supreme Court's invitation to file a "report". Of the 8 reports, only 2 favored televising criminal trials (Baker and Green). One was somewhat neutral (Mounts) and the other 5 (Sholtz, Smith, Pate, Hanlon and Richardson) were largely opposed to the rule.

[52]If there were such hearings which included *testimony,* the results are not filed with the Clerk of the Florida Supreme Court.

[53]*See,* ARB at 15-22; *see also,* Appellants' Brief at 42, and the Appendix thereto, AB-11.

Perhaps, the most significant response to Appellee's and *Amici's* contention, however, is found in the knowledge that the Florida Supreme Court could have, and should have, formulated a meaningful study *before* it embarked on this uncharted course. See, ARB at 18, 20-21. The failure to have done so implicates the Due Process Clause even without a showing of specific, measurable prejudice.

C. The "In House" *Post Hoc* Office of the State Administration (OSCA) Survey Commissioned and Relied Upon By the Florida Supreme Court to Sustain the Experiment in Televising Criminal Trials is Constitutionally Deficient and "Scientifically Unacceptable".

D. A Close Analysis of the Survey Establishes That There is a Constitutionally Significant Number of Witnesses and Juror Respondents Whose Acts, Conduct, Behavior, Self-Perception and Role in Televised Trials Were Affected by the Presence of Electronic and Still Photographic Equipment.

E. Due Process of Law Compels Closing the Courtroom to the Camera's Eye.

Appellants rely on the arguments in their Initial Brief on Points C, D, and E.

V.

NEITHER THE APPELLEE'S NOR *AMICI'S* BRIEFS JUSTIFIES THE CONTINUED TELEVISING AND PHOTOGRAPHING OF CRIMINAL TRIALS IN PROGRESS OVER A DEFENDANT'S OBJECTION.

A. The Media *Amici* Represent Special Interests, and Are Not the Public's "Surrogate".

This Court has a duty to the Constitution, and to the Appellants' right to a fair and impartial trial. The *Amici* briefs reflect special interests seeking to divert this Court from its duty. RTNDA's Brief, for example, urges this Court to continue the experiment because of the ". . . rich variety of approaches in terms of the technical specifications . . ." *Id.*, at 24. How that serves as a logical basis for continuing to televise a criminal trial over the accused's objection is beyond comprehension. It has been reported that in the past ten years, "[c]rime certainly brought out the worst in broadcasting in its day-by-day exploitation on both the news and entertainment segments of the [television] schedule." Barrett & Sklar, *The Eye of the Storm: The Alfred I. DuPont-Columbia University Survey on Broadcast Journalism,* 20 (1980).

The media is not bound by, nor married to, their Code of Ethics. For if it were, then "[j]ournalists at all times [*would*] show respect for the dignity, privacy, ***rights,*** and well-being of people encountered in the course of gathering and presenting news."[54] Presumably media does strive for accuracy and objectivity. However, in reporting, the media rarely considers the impact that even a "straight"[55] news story has on a defendant's right to be tried by a particular jury which has been painstakingly selected by both prosecution and defense counsel. See, *United States v. Williams, supra.*

Media's efforts at "self-policing" have been largely unsuccessful. Television in particular has been responsible for the growth of a new area of tort law, "broadcast liability". See, Perlman & Marks, *Broadcast Negligence: Television's Responsibility for Programming,* Trial (August 1980). This, then, is the "surrogate" in which Appellee and the States' Attorneys General would have us place our trust.

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[54]Code of Ethics of the Society of Professional Journalists [*see* subsection on "Fair Play"].

[55]A "straight" news story is one devoid of editorializing or commentary. *United States v. Williams,* 568 F.2d 464, 466, n.1 (5th Cir. 1978).

Finally, the Appellee and media claims of the "surrogates' " role as an educator,[56] can neither be taken seriously, nor serve as a basis to override individual Constitutional rights.[57] That argument is met by the Report of Palm Beach County Circuit Judge Thomas E. Sholts, previously provided to the Court.[58] Judge Sholts stated:

> The media claims the right to take still photographs, to tape and broadcast testimony and to televise trials because it wishes to educate the public. *I doubt the intellectual integrity of the media's position in making its request to change Canon 3A(7).*[59] [emphasis added].

B. Traditional Adherence to Federalism is Insufficient Justification for Continuing the "Experiment" in Televising Criminal Trials.

How true it is, "politics makes strange bedfellows." The distinguished former Attorney General of the United States, Griffin B. Bell, argues on behalf of the Conference of Chief Circuit Justices, that this Court ought not interfere with the rights of the individual states.[60] Several media *Amici*[61] press that same argument, in one form or another, along with Appellee, who mentioned it in passing.[62] Ironically, that issue is only obliquely raised by the seventeen States which joined in the States' Attorneys General's Brief.[63]

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[56]*See* Appellee's Br. at 104-111; FNI Br. at 20-21; PBS Br. at 12-13.

[57]*See* Appellee's Br. at 111 (Defendant has a superior right to a fair trial).

[58]SAG Br. at 8, n.2.

[59]"Report to the Florida Supreme Court Regarding the Use of Audio-Visual Equipment During the Mark Hermann Murder Trial," at 15. Other observations by Judge Sholts are equally telling. He confirms virtually every argument advanced by Appellants. *Id.*, at 16-21.

[60]CCJ Br. at 4-14.

[61]CBS Br. at 10, n.20; RTNDA Br. at 27-29; PBS Br. at 23-25.

[62]Appellee's Br. at 112-117.

[63]SAG Br. at 4-6.

The sudden movement towards, and interest in, the principles of "Federalism" are obviously tied to Mr. Justice Rehnquist's dissenting opinion in *Richmond Newspapers, Inc. v. Virginia, supra,* 100 S.Ct. at 2842-2844. This issue was never raised before at trial, or at any State appellate proceeding. A variation on this theme of "federalism" is the abortive attempt to apply the "Pullman Abstention Doctrine".[64] These arguments fall far short of the mark.

In the first place, we are *not* dealing with an issue involving State Court procedure, hence, Appellee's reliance on those cases cited in its Brief at pages 112-113 is misplaced. None of those cases[65] are relevant to the issue *sub judice,* nor are any of the cases which concern "abstention".[66]

Moreover, Appellants do not quarrel with the notion that States should be left free to "experiment" in social and economic areas as suggested by Mr. Justice Stevens in

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[64]Appellees Br. at 113, and CCJ Br. at 7, n.11.

[65]*County Court of Ulster County, New York v. Allen,* U.S. , 99 S.Ct. 2213 (1979) (New York statutory presumption valid), *Wainwright v. Sykes,* 433 U.S. 72 (1977) (decision below based on adequate state grounds); *Henderson v. Kibbe,* 431 U.S. 145 (1977) (mere erroneous jury instruction by itself not valid grounds for collateral attack on State Court judgment); *Whalen v. Roe,* 429 U.S. 589 (1977); *Murphy v. Florida,* 421 U.S. 794 (1975); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) *(Broadrick* reiterated the principle that Constitutional rights are personal and may not be raised by third parties. How then does the media litigate the "public's right to know"?); *Williams v. Florida,* 399 U.S. 78 (1970) (six-man unanimous jury in noncapital case approved); *Spencer v. Texas,* 385 U.S. 554 (1967) (State Rule of Procedure not fundamentally unfair); and *Beck v. Washington,* 369 U.S. 541 (1962) (record established that Grand and Petit juries were not biased despite pervasive pretrial publicity).

[66]*Stone v. Powell,* 428 U.S. 465 (1976) (Federal Courts will not entertain State *habeas corpus* convictions where there has been a full opportunity to present Fourth Amendment claims); *O'Shea v. Littleton,* 414 U.S. 488 (1974) (abstention doctrine applies absent irreparable harm); *Younger v. Harris,* 401 U.S. 37 (1971) (Federal Court will not interfere with pending State criminal cases absent bad faith or harassment); or *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941) ("Pullman Abstention Doctrine").

Whalen v. Roe, 429 U.S. 589, 597-598, n. 20 (1977). Provided, of course, no individual personal Constitutional right is lost during the experiment. What Appellee and *Amici* fail to appreciate, however, is that the televised criminal trial rule is neither a social, nor economic, experiment. It is, instead, an ill-advised experiment in "living" jurisprudence, the effects of which, at best, are unknown, and at worst, disastrous.

Former Attorney General Bell dismisses Appellants' arguments as ". . . a parade[67] of speculative horribles to fight phantom issues." (CCJ Br. at 12, n. 23). That "speculative" parade marched through Miami, without a permit, in the wake of the McDuffie verdict. The issue was real, not illusory, to Adelita Green. *See, Green v. State,* 377 So.2d 193 (Fla. 3d DCA 1979) (cert. granted by the Florida Supreme Court, Case No. 57,398). Parades are for circuses which is what cameras make of the courtroom.

When one argues for victory, and not for truth, he may be assured of just one ally, the devil himself, and that is to whom the "dues will be paid" unless this Court ends the experiment.

C. Neither the Application of the "Government In The Sunshine" Concept, Nor the Expenditure of Public Funds Justifies the Violation of Fundamental Individual Rights.

Finally, it is argued that Florida's commitment to "Government In The Sunshine"[68] and the expenditure of public money for educational television,[69] justify televising criminal trials over a defendant's objection. Both propositions border on the ridiculous when measured against

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[67]"A parade is a large public procession, usually including a marching band and of a festive nature, held in honor of an anniversary, a person, an event, etc., and accompanied by marching band music." *Random House Dictionary of English Language,* 1045 (Unabridged Ed., 1967).

[68]FNI Br. at 15-20; PBS Br. at 23-25.

[69]PBS Br. at 7-23.

the Constitutional rights of the accused in the framework of our system of criminal justice.

It is well known, medically, that too much sun can cause skin cancers. The "surrogates" do not care what "disease" they visit upon the public figure, nor do they care what ". . . tattoo [they leave] on the epidermis." *Carlisle v. State,* 176 So. 862, 864 (Fla. 1937). Regardless of the effect on the accused, the nightly news "must go on". Florida's commendable commitment to "open government" ought not be extended to the point where it devours individual Constitutional rights. Florida's Courts are, and will remain, open to the public, even if Appellants prevail. Only the television and still photographic equipment will be barred. News reporters and the public alike will continue to have access to the courtroom.

How does televising a criminal trial over the defendant's objection ". . . afford the accused greater protection than the Federal Constitution requires"? (PBS Br. at 26, footnote omitted). How does the expenditure of millions of dollars on public broadcasting justify televising a criminal trial over a defendant's objection? So what if public television now reaches millions of households daily? What do *Sesame Street* and *Mr. Roger's Neighborhood* (PBS Br. at 12, n. 14), have to do with a defendant's rights to a fair and impartial trial, and Due Process of Law? As Dean Erwin N. Griswold wrote:

> A courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama, and is not held for public delectation, or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process.[70]

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[70]*The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered,* 48 ABA Journal 615, 616 (July 1962).

Former Attorney General Bell argues, ". . . that under the Federal system, states are given broad latitude to experiment in solving problems." (CCJ Br. at 7). What problems have televising a trial over a defendant's objection solved?

CONCLUSION

Appellants' case presents no apparent conscious prejudice. However, there are other cases, pending and yet to be tried, which will present different and even greater degrees of measurable prejudice. The mere fact that there is no "litmus paper" test to measure the subconscious effect of televised criminal trials, is insufficient justification to deny the relief sought, or to decline to fashion meaningful guidelines for the bench, the bar and the public. Whatever affects one man directly, affects all men indirectly.[71]

John Donne, the distinguished and revered 16th Century English poet said it far more succinctly:

> No man is an island entire of itself; every man is part of the main . . . Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.

This Court has a Constitutional obligation to "sound the death knell", to "toll the bell", to put an end to this ill-advised experiment in criminal justice.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
By: Joel Hirschhorn, Esquire
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320
Counsel for Appellants

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[71]An unsolicited letter filed in The Florida Supreme Court by "ordinary" citizens sums up Appellants' argument rather well. It is printed in its entirety in ARB at 23.

Appendix
to
Reply Brief

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REPORT OF THE [WISCONSIN] SUPREME COURT COMMITTEE TO MONITOR AND EVALUATE THE USE OF AUDIO AND VISUAL EQUIPMENT IN THE COURTROOM

(APRIL 1, 1979)

(EXCERPTS)

A. **RE: STATE v. DILLABAUGH**

1. Remarks of Court Observer:

* * * * *

The movie camera could be heard by the observer just before the rail, but only during very quiet pauses. The shutters of the still cameras were clearly audible throughout the trial. *Id.*, at 7.

* * * * *

All wanted photographs of the 5-year-old complainant who was to take the stand after the recess.

* * * * *

There had been some problem the day before with the microphones on the counsel's table picking up defense counsel-client and co-counsel-counsel conversations. Apparently, if the volume of a home television set was turned up high enough, these conversations could be understood. *Id.*, at 8.

* * * * *

While the defendant was testifying, his attorney objected to the fact that the defendant was being photographed with

one of the exhibits (the paddle used in the alleged battery) in his hand. He objected, for the record, that the prosecutor had made his client pose in a manner "calculated for picture taking and improper." *Id.*, at 9.

* * * * *

2. Remarks of Trial Judge:

What, if any, influence do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on you during the trial?

I was conscious of their presence, although I couldn't hear the camera shutters, for instance. They had an indirect effect in that a large courtroom with good acoustics was used, which made it easier to hear the witnesses. The cameras made me more aware of my posture, so I sat erect much of the time.

* * * * *

Did the presence in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras produce more letters, telephone calls, et cetera, than you usually receive?

No, there were some comments from acquaintances who had seen me on TV, but I don't get many calls or letters about cases anyway.

What, if any, impact do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on the witnesses?

They were more apprehensive, nervous, scared. The fact that it was a full courtroom with a lot of activity may have combined with the presence of the cameras to cause this. *Id.*, at 11.

* * * * *

What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the behavior of counsel?

The cameras affected them in their unconscious actions, in the same way the cameras affected me — little things like sitting up instead of slouching down. *Id.*, at 12.

* * * * *

Overall, what is your general evaluation of the use of (a) television cameras, (b) radio equipment, and (c) still cameras, in the courtroom?

Basically, I don't believe in them. If I were charged with a crime, I would not want it to be televised or photographed.

Everything went beautifully in this case, but this wasn't a serious enough case. There will be trouble with cameras in the courtroom in other cases.

If the defendant had been convicted, I would have been criticized for not sequestering the jury. As it was, they probably watched themselves on TV at night during the trial. *Id.*, at 13.

* * * * *

3. Remarks of Defense Attorney:

* * * * *

To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

The still cameras were too loud, there was too much movement and jockeying for position by the still photographers, especially during dramatic moments when there was a distracting flurry of activity by the photographers.

The television cameras in the hallway outside followed the jurors entering and leaving the jury room, and I think that this had an undue influence on the jurors, giving them almost a celebrity status. *Id.*, at 14.

* * * * *

What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the jury?

There was unnecessary filming of them when they were not in the jury box. This placed an undue influence on the jury, and they may have been caught up in the drama of the thing. The cameras, TV and still, could have affected their judgment and distracted them from their duty. *Id.*, at 15.

* * * * *

4. Remarks of Prosecutor:

* * * * *

To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

The clicking of the still cameras was distracting. *Id.*, at 17.

* * * * *

What overall advantages, if any, do you ascribe to the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

The nightly replay was helpful.

My only concern with cameras is their effect on reluctant or frightened witnesses. Testifying in public is hard enough without putting their performance on television. *Id.*, at 19.

* * * * *

B. **RE: THE McCOY MURDER CASE**

1. Remarks of News Director for Commercial Television Station:

* * * * *

All in all, I saw the jury distracted from their concentration on testimony perhaps once or twice during the entire proceeding; and only one or two jurors at each of those times. *Id.*, at 26.

* * * * *

2. Remarks of Trial Juror:

One juror wrote: "I would just as soon see cameras in court discontinued. It was neither a good or bad experience for me." He also said that his wife received a number of calls on seeing him on television, and he expressed the fear that in some cases those could be crank calls. *Id.*

* * * * *

C. **THE TRIAL OF RICHARD TODD BUCK**

1. Remarks of Observer:

* * * * *

Judge Holz, however, claimed that the cameras simply add an extra burden on the judge in an already difficult situation, for example, an important murder trial . . . The defense and prosecution both agreed that they would rather try a case without cameras in the courtroom. Their rationale, however, differed. The prosecutor claimed that media coverage puts the trial in the public eye. For that reason, he claimed, the jury is reluctant to return a harsh verdict. He further complained that camera use automatically gives defense counsel an issue for appeal. Defense, on the other hand, claimed that the notoriety of a covered trial makes the jury more reluctant to return a lenient verdict. *Id.*, at 29.

* * * * *

In response to the questions as to whether the use of cameras resulted in more letters, telephone calls, etc. than he usually receives, the judge responded, "definitely." He also thought that the cameras have "a noticeable effect" on the witnesses. *Id.*, at 30.

* * * * *

In his responses to the questions put to him by our observer, defense counsel Shellow asserted that the presence of cameras in the courtroom distracted him from the tasks at hand during the trial "regularly." As to whether the presence of cameras affected the strategy of litigation, Mr. Shellow declared that "it affected the basic decision of whether we would have the defendant take the stand in the case." He also expressed the opinion that the cameras had "an obvious effect on one witness, . . . who was extremely distraught while testifying in front of the cameras." *Id.*, at 31.

* * * * *

Our observer points out that defense counsel did not argue for a not guilty verdict at any time during the proceedings, and

that the verdict of manslaughter rather than second degree murder was regarded as a victory for the defense. When asked whether he thought the use of cameras had an effect on the fairness of the trial, Mr. Shellow responded, "Certainly. Prosecutor Sosney was obviously responding to camera use during the trial." Finally, Mr. Shellow indicated that he would have preferred to try the case without cameras in the courtroom, asserting that the practice "unfairly prejudices the jury. Distorts fact finding. Only one juror during the voir dire was candid enough to admit that the cameras might have affected him. The others were 'less than candid,' when they claimed their use would have no effect."

In his responses, defense counsel Glynn said that the cameras distracted him "on occasion," that the presence of cameras affected the choice of exhibits offered into evidence, because of the sensitivity of matters at issue, and he declared that "we changed examination strategy" because of the presence of cameras in the courtroom. *Id.*, at 31-32.

Mr. Sosney [the prosecutor] did not believe that the use of cameras had any effect on the length of the trial, but when asked whether it had any effect on the outcome of the trial, he responded: "It is difficult to speculate. Yet, jurors must feel unusual because of the uniqueness of media coverage." In response to the question as to whether the cameras affected the fairness of the trial, the prosecutor replied: "If anything, it is unfair to the state's interest and to the people of Wisconsin. The cameras made conscientious people reluctant to pull the trigger." Asked whether, if he had a choice, he would have preferred to try the case with or without the cameras in the courtroom, Mr. Sosney replied: "The use of cameras is not only unfair to the people of Wisconsin, it adds an unneeded expense to the trial of cases. For example, the jurors were sequestered in this case, when they otherwise would not have been." Finally, in response to the query as to whether the use of cameras had any overall advantages, our observer quotes the

prosecutor as follows: "*None.* There is not a need for the extra coverage allowed by the use of cameras. The media are there only to present sensational issues to the public, not to satisfy the public's need to know. This is well illustrated by the manner in which the cameras have been used up to this time." *Id.*, at 33.

GOVERNOR'S DADE COUNTY ADVISORY COMMITTEE

DADE COUNTY COURTHOUSE
73 W. Flagler
Miami, Florida

July 8, 1980
6:00 o'clock p.m.

EXCERPT OF
KENNETH I. HARMS
CHIEF OF POLICE.

THEREUPON:

KENNETH I. HARMS

was called as a witness, and, after having been first duly sworn, was examined and testified as follows:

BY MR. BLOCK:

Chief, for the record, will you please give us your official title?

BY CHIEF HARMS:

Chief of Police of the City of Miami Police Department.

* * * * *

BY MR. BLOCK:

Are you suggesting, and don't let me put words in your mouth, that the media had anything to do with causing the riots?

BY CHIEF HARMS:

I most certainly am.

BY MR. BLOCK:

Are you suggesting that the media's coverage of the McDuffie trial contributed to the riots, the disturbances, or the rebellion?

BY CHIEF HARMS:

Absolutely.

Understand that this is a prospective that I am sharing with you, and this is based on the fact that I am a lifelong resident of Dade County, and I have been involved with the Criminal Justice System here within this community for in excess of twenty years. It is a professional judgment and it is a personal judgment.

* * * * *

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

[Officers and seal omitted]

RESOLUTION

OF THE

ANNUAL GENERAL MEMBERSHIP
BUSINESS MEETING

WHEREAS, traditionally cameras and recording devices have been excluded from courtrooms in virtually all jurisdictions, and

WHEREAS, the members of the National Association of Criminal Defense Lawyers, Inc., as a group of persons regularly involved in the trial of criminal cases believe that the use of such devices at present could tend to impair the integrity of jury trials because of potential and as yet undetermined effects upon witnesses, jurors, defendants, judges and lawyers, and

WHEREAS, there do not at present appear to be any corresponding benefits to be derived from introduction of such devices into trial courtrooms, now therefore,

BE IT RESOLVED, that the National Association of Criminal Defense Lawyers, Inc. declares its opposition to the use of cameras and recording equipment in all criminal trials.

/s/ C. ANTHONY FRILOUX, JR.
President

OFFICE OF DISTRICT ATTORNEY
MILWAUKEE COUNTY
E. Michael McCann District Attorney

[Seal of Office and address omitted]

October 10, 1980

Mr. Joel Hirschhorn
Attorney at Law
742 Northwest 12 Avenue
Miami, FL 33136

Re: *Chandler v. Florida and State of Wisconsin v. James Ray Mendoza*

Dear Mr. Hirschhorn:

Jon Genrich has kept me closely posted as to the correspondence between you and him. As you know, we are profoundly committed to the position that cameras should be excluded from the court when vetoed by the defendant.

Please feel free to use any of the materials forwarded to you by this office in any manner in which you would feel useful.

I also wish to assure you of my belief after seeing a number of instances where cameras appeared in court that justice is not well served by the admission of television cameras to the courtroom.

As an elected official, I can fully appreciate the unique opportunities for political advancement provided to a district attorney or judge by having cameras cover a notorious case. I for one firmly believe that the presence of cameras in a celebrated case inevitably obliquely or directly applies pressure to a juror to deliver a verdict of guilty. I profoundly

respect the jury system and do not casually ascribe pusillanious expectations to citizens sitting in judgment on another citizen. At the same time, my experience of human nature observed from fifteen years in the working pits of a prosecutor's office convinces me that some sensitive jurors may experience unstated pressures from the presence of the cameras. A defendant is entitled to have all jurors free from any extraneous pressure other than the oath which they take.

I note that an amicus brief has been filed by a number of Attorneys General supporting the cameras in court concept. In the abstract, from the often halcyon upper reaches of an Attorney General's office, the proposal may seem attractive from a "right to know" approach. At the same time, I know Mr. La Follette personally and have always found him to be a man of exceptional commitment to justice. I strongly suspect that were he to be privy to some of the excesses I have already witnessed by cameramen in the court he would change his position on the issue.

The local media has uniformly opposed our position. We neither seek nor curry anyone's favor by our continued stand in favor of the defendant's right to a fair trial. John Donne said it best when he noted that no man is an island. I weep when any man's right to a fair trial is tolled for I do not doubt that with that tolling every man's right is lost.

Sincerely yours,

/s/ E. MICHAEL McCANN
E. Michael McCann
District Attorney

RICHARD C. McFARLAIN
Attorney at Law

[Address and office notation of receipt omitted]

June 8, 1977

The Honorable Alan C. Sundberg
Justice, Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Cameras in the Courtroom — Noise Level of Camera Clicks

Dear Mr. Justice Sundberg:

Please refer to Hon. C. Gary Williams' letter to you dated June 1, 1977.

So we have come to this. Apparently the argument has foundered to the point of whether the "Miami Herald" can stop Nikons cricking in court or whether this can be overcome by the use of a blimp. I have always been big on blimps myself; the bigger they are the more I like them.

May I suggest as a compromise that Nikons be allowed to use blimps provided that they have a cap over the lens to insure the blimp gives no distortion to the photograph. To give Leicas equality, they too should remain covered and may use blimps (dirigibles for the larger ones) if they wish.

I trust the recipients of this letter will signify their support or nonsupport in the usual manner in this unusual case and that this issue will be resolved quickly.

The questions remain, however, of; 1) what we are going to do to stop the television industry from turning judges green

when they run their clips on the evening news; 2) can trial judges wear pastel robes in an attempt to counterbalance this perfidious move towards the greening of the judiciary; and who gets the residuals?

Respectfully,

/s/ RICHARD C. McFARLAIN
Richard C. McFarlain

DR. HELEN PENNER ACKERMAN, ED.D.
Licensed Psychologist

[Address and Florida Supreme Court Clerk's notation of filing omitted.]

December 16, 1977

Justices
Supreme Court of the State of Florida
Tallahassee, Florida 32304

Dear Sirs:

I have enclosed a copy of a comment which will be published in a professional psychological journal. Also enclosed is a copy of a letter to me from Dr. Joseph Sanders of the American Psychological Association. I do wish to suggest that as you evaluate the role of the television camera in the courtroom,

you consider having input from the Florida Psychological Association and its members. Thank you for considering comments from professional organizations.

Sincerely,

/s/ HELEN ACKERMAN
Helen Ackerman

Law Offices

McFARLAIN AND BOBO

[Firm members names, address and telephone number omitted.]

June 14, 1978

Joel Hirschhorn, Esq.
Hirschhorn and Freeman
742 Northwest 12th Avenue
Miami, Florida 33136

Dear Mr. Hirschhorn:

Thank you for your letter of June 9. I truly regret missing your oral argument in the recent Cameras in the Courtroom case, but was tied down with the end of the legislative session.

You inquire regarding the use of Professors Miller and Brigham. Justice Sundberg tried to arrange some kind of academic review by those gentlemen, as well as people at the University of Florida, but, to the best of my knowledge, nothing came of it. He may now be in a position to have some professorial unit study the results so far, but I have not asked him.

I did attend a "viewing" in the basement of the Supreme Court which the Court attended as well as counsel for the television station, where a station was showing what was supposed to be highlights of the year. It was as dismal a performance as I have ever seen, and several of the members of the Court were amused at the results. Other than that, all I know of what has been happening is that Judge Baker, who loves show biz, is writing learned memos on how marvelous the Zamora trial was, and other judges who are hot to trot to put on greasepaint and try the case, are using whatever influence they have to convince the court that this whole thing is marvelous.

An attempt or two has been made to pull the rug out from under me as counsel for the Bar in this case. Judith Kreeger, whose firm represents some television interests in Miami, is Chairman of a Bar Committee, that, unbeknownst to me, sat in judgment on this issue. I wrote her a letter, copy enclosed, but it didn't do any good, though she read it to the committee. It is my understanding they ended up with a tie vote and are in a quandary now, which is a good place for a Bar Committee on this subject.

I encourage you in your work. I have no objection to your using any correspondence of mine. I do fear that the camel now has his nose under the flap of the tent and pretty soon the hump is going to be in with him and we are all going to be out in the cold in the desert while TV runs the show.

With best wishes, I am

Very truly yours,

/s/ RICHARD C. McFARLAIN
Richard C. McFarlain

ALICE M. PADAWER-SINGER, Ph.D.
130 East 67 Street
New York, N.Y. 10021

(212) 737-7897

July 7, 1978

J. Hirschhorn, Esq.
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25 West Flagler Street
Miami, Florida 33136

Dear Mr. Hirschhorn:

As you know, I have conducted various studies of jurors in courts, including the Free Press-Fair Trial Study and decision

making in the twelve-vs.-six-Member Juries under Unanimous vs. Non-Unanimous Juries.

As per your report, I am enclosing the last article published which summarizes some of my studies. This article was written at the invitation of the American Trial Lawyers Association-Rosco Pound Foundation Annual Meeting in 1977.

I am enclosing my vita for your information re other publications. I have been invited to organize a conference for judges at the American Bar Association Conference on August 8, 1978 from 9:30 A.M. to 12 Noon, and will present research data.

I believe that it is imperative that a study evaluating the effects of TV cameras in court on the behavior of participants in a trial should be conducted before one can give a blanket approval or disapproval. It is important to ascertain under what circumstances should trials be televised and/or what modifications in televising should be included in a decision to allow cameras in court. I am most interested in directing and conducting such a study.

Please keep me informed.

Sincerely yours,

/s/ ALICE M. PADAWER-SINGER
Alice M. Padawer-Singer

Department of
COMMUNICATION

The University of Michigan
Ann Arbor, Michigan 48109

7 August 1980

Joel Hirschhorn, P.A.
Attorney at Law
742 Northwest 12th Avenue
Miami, Florida 33136

Dear Joel:

Enclosed, as you requested, are copies of several documents related to my proposed *controlled* experiment on the issue of cameras in the courtroom. Included are a description of the experiment, an abstract of the proposed study, and correspondence with various members of the judiciary in Indiana and Michigan. I have been trying for several years (first in Indiana and now in Michigan) to get approval from the state supreme courts for the study. Tentative approval from the chief justice of Indiana was withdrawn after I secured the cooperation of trial judges.

My proposed study would differ from so-called "experiments" conducted or under way in several states in two fundamental and significant respects. (1) Other variables or factors would be held constant while the crucial or independent variables to be tested (such as the presence or absence of cameras) would be manipulated or changed. (2) Aspects of the behavior of trial participants under those differing conditions would be actually and reliably measured.

To the best of my knowledge, none of the pilot programs masquerading as "experiments" in various states has measured the behavior of trial participants (with cameras absent and present) in a scientifically valid manner. With a very few notable and more sophisticated exceptions, the

procedure with most of those so-called "experiments" has been merely to allow the cameras in the courtroom, and then *ask* various participants whether they were affected by the cameras. Such a procedure is inadequate, laughable, or both. Surely most attorneys *and* journalists have had the experience of questioning a person who would say one thing in public and the exact opposite in private.

As you know, the research for my doctoral dissertation on the issue of cameras in the courtroom is complete, but the data are yet to be analyzed and the document written. In the dissertation, I will examine several aspects of two sensational murder trials in Indianapolis. Defendants for the same crimes were granted separate trials; television cameras had access to one of the trials and were excluded from the other. Although the findings will be interesting, they are not ready and they will not be definitive. Although those two trials provided an opportunity for a study far more rigorous than most of those being referred to as "experiments" elsewhere, too many variables remained uncontrolled. The data must be cautiously interpreted.

I regret that I cannot provide you (and others) with some scientifically valid data that clearly show what impact and presence of cameras has on trial participants. But I am cheered by the fact that no one else can either. Such data, to the best of my knowledge, do not exist.

Yours sincerely,

/s/ DALTON LANCASTER
Dalton Lancaster
Assistant Professor

[Handwritten letter addressed to]
Judges: Supreme Court — Florida
[bearing the stamp,] " Filed: Dec. 5, 1978
Clerk, Supreme Court"

Gentlemen:

We sincerely hope that you will have the integrity to forbid televising in courtrooms.

Television is primarily an entertainment medium, and it is unjust to bring anyone to trial in its eye.

As for Justice — she should remain blindfolded — not have one eye peeking at TV cameras. Lawyers, and some judges may enjoy acting in front of TV, but the person on trial should not be under that added strain.

It will be a sad day indeed if Florida adds courtroom trials to its tourist attractions.

Sincerely,

/s/ MR. AND MRS. J. W. LIVINGSTON
522 Shell Point
Fort Myers, Florida 33908

Nov. 20'78